**Muchira v Republic (Criminal Appeal E041 of 2024)**
**[2025] KEHC 7058 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7058 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERUGOYA**

**CRIMINAL APPEAL E041 OF 2024**

**JK NG'ARNG'AR, J**

**MAY 28, 2025**

**BETWEEN**

**SILA KINYUA MUCHIRA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of Hon. S. M. Nyaga (PM) at Baricho Law Court Sexual Offence Case No. E014 OF 2023 delivered on 23rd October 2024)***

**JUDGMENT**

## A. Introduction

1. The Appellant being aggrieved by the trial court's decision that convicted him for the offence of attempted defilement contrary to Section 9(1) and 9(2) of the *Sexual Offences Act* No. 3 of 2006 has lodged this appeal. He seeks that his conviction be quashed and the 10 years' imprisonment sentence set aside.

2. The appeal is premised on the following grounds that:

    a. The learned magistrate erred in law and facts by failing to consider that the evidence produced in court was not credible.

    b. The learned trial magistrate erred in law and facts by failing to consider that the prosecution did not prove its case beyond reasonable doubt.

    c. The learned trial magistrate erred in law and facts by failing to properly analyze the evidence adduced by prosecution the defence.

    d. The learned trial magistrate erred in law and facts by failing to consider that the complainant was coached by the prosecution to what to testify.

e. The learned trial magistrate erred in law and facts by not considering that the ingredients of the offence was not fully proved.

f. The learned trial magistrate erred in law and facts by not considering that the prosecution case was full of contradictions and inconsistencies.

g. The learned trial magistrate erred in law and facts by failing to consider my defence and mitigation factors.

3. Before the trial court, the Appellant was charged with the principal count of attempted defilement contrary to Section 9(1)(2) of the *Sexual Offences Act* instead of Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* and which I do not think it affected the accused in any way in understanding the offence he was charged with. The particulars of the principal count read that it was on 12th day of May 2023 at [Particulars Withheld] in Kirinyaga West Sub County within Kirinyaga County, he intentionally attempted to cause his penis to penetrate the vagina of PWK a child aged 4 years and 9 months. In the alternative count, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the principal count read that it was on 12th day of May 2023 at [Particulars Withheld] in Kirinyaga West Sub County within Kirinyaga County, he intentionally rubbed his penis against the vagina of PWK a child aged 4 years and 9 months.

4. The appellant pleaded not guilty and to prove its case the prosecution called 6 witnesses while in his defence the Appellant gave sworn defence and called no witnesses.

**B. Prosecution case**

5. The trial curt undertook voire dire examination on the complainant who testified as PW1 and upon examining the complainant and found she had the ability to appreciate the concept of oath and consequence of perjury. This led to the trial court directing that she gives sworn testimony.

6. PW1 testified that she did not know the accused for she had never seen him before and that he inserted his penis into his vagina. All that occurred in the forest as she was talking to W, S and K. It was then her father appeared and beat up the accused and from then he took her to hospital then to the police station. In cross examination she said she did not know why the other 4 children she was with never reported to their teacher who was in class as they were playing in the field. She did not see the accused carrying anything and when her father came, it was her mother who asked her to tell the truth which she did as she denied being coached on what to say.

7. Her father – CK (PW2) testified of how he met the accused for the first time on the material day of 12th May 2023 at about 11.30am and this was after he had received a call from PW1's teacher - Ms. Joyce asking him if he has sent someone to pick P0W1 up. When he denied, she went on to inform her that there was a stranger who had picked PW1 up so he rushed to the school. It was then the teacher informed him that other pupils had seen PW1 being picked up by the said stranger so they followed the normal route where they found a man cultivating his land and he in turn informed them a man had passed there with a child in uniform. He knew the said man, the accused herein, well for he used to work at their home so he directed them to his house but when they went there they did not find the accused so they checked the tea plantation accused used to work in but they did not find him. The 2 workers therein who said they had not seen him so they moved to the next farm which had a forest as the earlier man they found in his farm informed the of the area being prone to raping and killing. Since the said man had accompanied them, they left PW1's teacher behind as they had seen footprints which they followed then on listening they heard someone walking. It was then they found the accused sitting on PW1 and a good Samaritan took PW1 to her teacher while he was left with the

accused while he made several phone calls. It was the gathered crowd that took accused to the Kabonge Police Station then took PW1 to Kerugoya Hospital where she was examined and treated. However, PW1 was so traumatized that she was unable to talk and was shaking as he identified the accused as the assailant he found his daughter with. In his cross examination, he denied finding the accused with sodas and cakes and it was the other pupils who saw him first then reported to the teacher. When he was later recalled for further cross examination by the accused, he said he never took photographs at the scene and he denied coaching the complainant as he confirmed he was not in the doctor's room during PW1's examination.

8. PW1's teacher – Joyce Wambui and on the material day during break time, she went for a short call and on her return she met with 2 of her pupils – S and S who were running towards her where they reported PW1 had left with a stranger. Since the gate was open with a not well done face, the 2 showed them the direction the stranger had taken PW1 which she checked but was all in vain for she did not see them. She went back to school and called PW2 and soon thereafter rushed towards the route she had been directed by her 2 pupils. On their way, they found the aforesaid man cultivating his land and he confirmed to them the stranger was their gardener who had passed there with a child but then they heard screaming coming from the forest. Unfortunately, she had been left in the tea farm and soon she saw the man who was cultivating carrying PW1 who was traumatized and so when the matter was handed over to the police, she narrated to them of how she had been defiled as the accused had inserted his penis in her vagina. In cross examination, she said that although she did not find him with PW1, he had been spotted by the pupils playing in the field.

9. Once taken to the Kerugoya County Referral Hospital, she was examined and treated by Pauline Njeru though Evelyn Nyawira Njeru (PW4) was her colleague who testified on her behalf. This was allowed with no objection from the accused as she stated she was familiar with her handwriting and she went on to rely on the PRC form which the former had filled while the latter filed her P3 form. She went on to testify that PW1 was 4 years and 9 months old at the time she was taken to hospital on 12th May 2023 and although no blood stains were seen, her dress was muddy and alleged that the perpetrator had removed her trouser and inserted his penis in her vagina. That all that occurred in a bush at Muragara area and on examination she had a bruise on the left anterior thigh and her vagina had an abrasion near the clitoris at 12 o'clock. The said injury was as a result of pressure, movement and contact but confirmed that her hymen was intact. The laboratory results indicated she had pus cells which could have been as a result of her hygiene and at the same time could have been as a result of sexual contact but no spermatozoa were seen. In cross examination she confirmed there had been no complete penetration of her vagina and she did not know what exactly had happened and since accused said he was HIV positive, they put PW1 on PEP to avoid HIV transmission. She however could not explain how her dress became muddy.

10. Martin Ndegwa Muga (PW5) in his testimony confirmed he was the man whom PW2 and PW3 found cultivating his land on the material day. He further testified that between 10 – 11am, he left his farm as he went back home to take tea at a nearby market/hotel and that was when he met with the accused and PW1 walking together. Since the 2 were talking and accused was drunk, he ignored them so he went in the hotel, took tea and returned to his farm. It was then he met with PW2 who was unknown to him while he was on phone so he stopped and said he was looking for a child and if he has seen her. It was then she told them he had seen accused with a child walking down a different route PW2 and PW3 were on and so the 2 changed their route. He accompanied them and in a bush they heard a commotion so PW2 got inside the bush then he saw PW1 escaping through the path in that bush. He took and carried her until he met with PW3 whom she handed her over to. It was then they called PW2 from the bush and he confirmed PW1 was dressed in her school uniform which was in court having been marked for identification. In cross examination he said accused's children went to him with his eldest borrowing a

sufuria from him. That as they passed him, accused had asked PW1 what the teachers were doing and she responded by saying they were taking tea and it was when he asked accused what time it was and he said it was 2pm when he concluded accused was drunk. Since accused was newly employed in the area, he though he knew PW1 well due to their conversation he overheard as he insisted he was not a liar.

11. PC(W) Ivy Mwende (PW6) testified as to how she was at the police station on the material day when accused was escorted there by members of public including PW1, PW2 and PW3 when complainant reported of having been called by the accused who was stranger to her though referred to him as grandfather who led her to a bush. It was then accused tried to insert his penis in her vagina and it was when she felt pain that she started complaining thus leading to them being caught by her father – PW2, PW3 and PW4. The following day she visited the scene where she recovered a cap which PW1 described as the one wore by the accused. She also accompanied PW1 to the hospital where she was examined and in cross examination she said she relied on eye witnesses account together with the medical report to charge the accused.

**C. Defence case**

12. Once put on his defence, the accused testified he used to be both a tea leaves picker and a herder and on the material day he was pruning the tea bushes next to PW5's home as he had been employed by PW5 while in the company of 3 others. At around 11am PW5 called him asking of his whereabouts and he informed him he was working for Mercy but then he asked to meet him. He obliged but when he met PW5 he was with 2 others who asked him the whereabouts of PW1 as they started to assault him together with the mob. PW1 was eventually traced from unknown place so they reported to the area chief who advised them to report to the police. That the witnesses recorded false statements for he was not found with PW1 and he did not understand why PW5 allowed him to go with the child when he saw them. Further, the medical documents from Kagumo Dispensary were negative yet when she was taken to Kerugoya she was seen to have bruises. In cross examination he denied being in PW1's company but then he recanted his earlier evidence in chief by stating that he had never met PW5 when he called him while he was in the company of Njagi and Chiru whom unfortunately never called as his witnesses for he felt they were not going to testify in his favour. To him PW1 was coached hence she had lied to the court.

13. Upon hearing all parties, the trial court delineated the following issues for determination: whether the accused tried to defile a child and if not, that if he committed an indecent act to her.

14. On the issue of age, the trial court held that it was not disputed that the complaint was about 5 years old and the birth notification produced proved her date of birth as 28th August 2018 thus conclusive proof that PW1 was a person under the age of 18 years. On the second issue, the trial court found that although PW1 alleged to have been defiled by the accused, the evidence of her father – PW2, that of the teacher – PW3 and the man cultivating the land – PW5, they together rescued PW1 from depth of the forest which was a venue for sexual exploitation, abuse and murder. Further, PW1's thighs and vagina had been interfered with and one may not know if accused had begun the process of penetrating her. The trial court thus concluded that the accused's actions amounted to an act of attempted defilement. On the identification of her perpetrator, PW1 has identified the accused as the one and even called him 'guka' meaning grandfather. That accused had also admitted having been arrested at the scene earlier mentioned by the rescue team thus found the court had no doubt accused was the man found at the scene with PW1. Ultimately, the Appellant was convicted and sentenced to 10 years' imprisonment and since he as aggrieved by this finding, he filed this current appeal before me.

**D. Appellant's submissions**

15. In arguing his appeal, the Appellant submitted he continued to plead not guilty to the charges against him for there had been a disagreement between him and his employer's son for he had a habit of stealing his mother's tea leaves. He reiterated his above defence and how he was assaulted yet all he knew was that the people were looking for PW1 who was later found at an unknown place to him. He went on to quote prosecution witnesses evidence stating their evidence was not corroborative and inconsistent hence unsafe to convict him. It was however interesting to see him submitting and I quote: ".....I beg this court since I have confident with it. To look the circumstances of this case and find that prosecution witnesses were incredible witnesses their evidence should not be relied on. I did not attempt to defile PW1. This court to find that there is no reason to dismiss this appeal against both conviction and sentence...." By this the court is actually asking me to find the prosecution witnesses to be credible and uphold both the conviction and the sentence met out to him. He further submitted that complainant never reported of bruises in the left anterior thigh, no lacerations were found as stated in the medical report and her clothes were not removed and nothing inserted in her. He urged the court to find contradictions therein and find that it was a grudge that led to him being framed up. He also did not understand why the complainant was given medication for the offence of attempted defilement had not been proved. Since the complainant testified that her clothes had not been removed, then there had been no intention by him to defile her thus he deserved to be acquitted. He also relied on the cases of Barasa v *Republic, Kitale Cr. Appeal No. 22 of 2006* and Sawe v Republic [2003] eKLR and find the evidence adduced against him was uncorroborated and the trial court had failed to evaluate the evidence before it and went ahead to convict him. Further, that his defence was not considered which was plausible but the prosecution never challenged it. Lastly he relied on the case of Okeno v Republic [1957] EA 32 as he asked me to weigh the evidence before me and make my own conclusion as he asked me to allow his appeal against both his conviction and sentence.

**E. Respondent's submissions**

16. The respondent submitted that it had proved its case beyond reasonable doubt vide all their witnesses evidence and urged this court to take judicial notice of the fact that children when giving testimony in such cases use euphemisms for which it relied on the case of Muganga Chilejo Saha v Republic [2017] eKLR. Further, the complainant testified of how the accused attempted to defile her but they were found by her father at the scene and later taken to hospital. The Appellant however did nothing to challenge that evidence but only admitted he lifted her. Further, the was a bruise on her left anterior thigh and abrasion near her clitoris due to the pressure in that area and although the hymen was intact, pus cells were found forming the opinion of attempted defilement yet the Appellant did nothing to challenge that evidence. Despite the other witnesses having known the Appellant, he was found at the scene and also the complainant pointed him out as the one who had picked her from the school. It further submitted that it had also proved the complainant's age for which it relied on the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR. In conclusion, it submitted that it had proved its case to the required standard with the trial court safely convicting the Appellant and prayed the same to be upheld.

**F. Analysis and determination**

17. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. For this, see the cases of Pandya v R [1957]

EA 336; Ruwalla v R [1957] EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal held that:

> "the duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

18. Having considered the record of appeal as well as the submissions by parties, I discern the following as the main issues for determination:

    a. Whether the offence of attempted defilement was proved.

    b. Whether there were contradictions and inconsistencies.

    c. Whether the sentence was harsh and excessive

**Whether the offence of attempted defilement was proved**

19. Section 9(1) of the *Sexual Offences Act* provides that: "a person who attempts to commits an act which causes penetration with a child is guilty of an offence termed attempted defilement". While Section 9(2) states: "a person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

20. In the case of Moses Kabue Karuoya v Republic [2016] eKLR the essential ingredients of an attempt to commit an offence have were laid down in the following words: "In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded."

21. Thus, for there to be an attempt to commit an offence by a person, that person must:

    i. Intend to commit the offence;

    ii. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfillment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;

    iii. Do some overt act which manifests his intention, that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence.

22. The facts of this case as set out by the complainant (PW1) is that she was in school playing with other children when the Appellant, whom she referred to as 'guka' meaning grandfather, called her and asked her to follow him. This she did despite the Appellant being a stranger to her and he led her to the forest. Once inside there when the Appellant inserted his penis into her vagina by what she called his 'kasusu'. It was then her father (PW2) found then and he immediately started assaulting the Appellant whom according to him, he had found him on top of his daughter (PW1) as he had sat on her.

23. This evidence was corroborated by PW1's teacher (PW3) who testified that once the above stated 2 students informed her that PW1 had been picked up by a stranger, she tried to follow them towards the route she was informed they had taken in vain thus returning to the school where she called PW2 who confirmed he had not sent anyone to pick his daughter up. Both PW2 and PW3 started to physically look for PW1 until they met PW5 who knew the Appellant thus confirming he had seen him with a child. eventually they found him in the bush which PW1 referred to as the forest and found her there.

24. In his defence the Appellant denied the evidence against him claiming that he had been framed up by PW5's son, whom not only he failed to give his name but also failed to bring forth evidence to prove that PW5 whom he alleged to be unknown to him, had framed him up with the offence against him. This was because all he testified to was that PW5 called him asking him to meet up with him and when they met, he found PW5 with 2 others who started asking him of PW1's whereabouts. He later heard that she had been found at an unknown place and that was when the mob started assaulting him and took him to the police station.

25. From the above analysis of events as stated by the prosecution and the defence, this court deduces that indeed on that fateful day, PW1 went missing from school only to be found in the bush/forest in the company of the Appellant who was a stranger to her and to me more precise, PW2 testified as to having found the Appellant sitting on PW1. This court thus finds that the explanation given by the Appellant does not rebut the strong evidence given by PW1 who was found to be a reliable and credible witness despite her being a minor pursuant to Section 124 of the *Evidence Act*. The Court also find it unbelievable that PW1 would have just left school on her own, be found in the bush/forest in the company of the Appellant yet in his submissions did he claim to have been framed up by PW5's son thus proving that the same was just an afterthought.

26. All this put together, the only logical conclusion aligns with the finding of the trial court that the Appellant had picked PW1 from school without anyone's authority, including that of her parents, then attempted to defile her as proved by the clinician as recorded in PW1's medical documents.

**Whether there were contradictions and inconsistencies**

27. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) it was held:

> " On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in Joseph Maina Mwangi vs Republic Criminal Appeal No. 73 of 1993, that:
>
> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of Section 382 of the *Criminal Procedure Code* to determine whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences..."

28. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the Appellant. I thus wish to rely in a decision of the Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR where the appellate court cited with approval the Ugandan case of Twahangane Alfred vs Uganda Cr. Appeal No. 139 of 2002 (2003) UGCA, 6, it was held that: "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a

witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

29. Guided by the above, this court has noted the above allegations of inconsistencies and contradictions do not go into the substratum of the matter. The issue at hand is one where the Appellant has been charged with the offence of attempted defilement whose ingredients have been well spelt out in the earlier paragraphs of this judgment. The contradictions referred to by the Appellant is not material. In her evidence in chief, PW1 was emphatic on the events of the day. The alleged contradictions in the medical reports from alleged 2 hospitals were contradictory but then I note the said medical documents were all from Kerugoya Hospital.

30. Looking at the evidence adduced holistically, against the alleged contradictions and inconsistencies, I find the contradictions remote and not prejudicial to the Appellant. They do not go to the substratum of the case. The alleged contradictions do not in any way cloud the fact that PW1 was found in the bush/forest with the Appellant laying on top of her. Consequently, this ground of Appeal fails.

31. In this case, the Appellant seeks that this Court sets aside both the conviction and sentence. I noted that in sentencing the Appellant, the trial court noted that the Appellant was not remorseful and how PW1 was lucky in life to have been found before being defiled. Considering the Appellant was HIV positive, the trial court concluded he ought to be punished in a manner to send a warning to other would be sexual beasts despite him being a first offender.

32. In the end, I uphold both the conviction and sentence. The appeal is thus dismissed for the same is unmerited.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025**

**.....**

**J.K.NG'ARNG'AR**

**JUDGE**

Judgement delivered in the presence of the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).